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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. OSCAR RODOLFO HERNANDEZ, Defendant and Appellant.	G054263 (Super. Ct. No. 14NF2386) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael A. Leversen and Cheri T. Pham, Judges. Affirmed.

Law Office of Oscar Acevedo and Oscar Acevedo for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, A. Natasha Cortina and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

Oscar Rodolfo Hernandez appeals from a judgment after a jury convicted him of sexual offenses involving his stepdaughters. Hernandez argues the following: the trial court erred by denying his motion to dismiss for precharging delay; the court made various evidentiary errors; the court erred by limiting his right to cross-examine witnesses; and there was cumulative error. None of his contentions have merit, and we affirm the judgment.

FACTS

I. Substantive Facts

Juan S. (Juan) and Maria F. (Maria) were married in 2009. Both had children from previous marriages: Maria had two daughters, S.R. and J.R.; and Juan had two daughters, Y.S. and E.S.

Juan and Hernandez had been friends for over 20 years. Hernandez was married to Rosa H., and they had five children, two of them together.

Before Juan married Maria, Rosa and her children would take care of Y.S. and E.S. while Juan was at work. The two families were very close and spent a lot of time with each other. The girls called Hernandez "Tio" or "Uncle."

On December 13, 2011, Maria was at home visiting with Victor Sauza, a family friend. S.R. told Sauza that Hernandez molested her. Sauza told Maria, and Maria questioned S.R. S.R. told Maria that Hernandez had touched her several times and she thought he also touched her sisters. Maria asked S.R. if Juan had touched her inappropriately, and she said, "No." Maria called Juan at work, and he came home. He asked S.R. what happened, and she told him that Hernandez molested her. Juan spoke with his other three daughters and each confirmed they had spoken with Maria about Hernandez. After Juan spoke with Maria, he called the police.

Detective Mucio Sanchez responded to the call and interviewed Juan, Maria, and the four girls. A week later, Orange County Child Abuse Services Team (CAST) social worker Sunday Petrie interviewed the four girls. Sanchez arrested

Hernandez, but he was released the next day. Two and one-half years later, Hernandez was arrested and charged.

II. Procedural Facts

On May 30, 2014, a felony complaint charged Hernandez with four counts, one count as to each child, of committing a lewd act upon a child under the age of 14 years (Pen. Code, § 288, subd. (a), all further statutory references are to the Penal Code, unless otherwise indicated). The complaint stated the earliest act occurred in 2003 and the last act occurred in December 2011. The complaint alleged Hernandez committed a lewd act on multiple children (§ 1203.066, subd. (a)(7)).

On March 23, 2015, an information charged Hernandez with eight counts of committing a lewd act upon a child under the age of 14 years (§ 288, subd. (a)) (counts 1-2 (S.R.), counts 3-4 (J.R.), counts 5-6 (E.S.), & counts 7-8 (Y.S.). The information alleged the same dates as the complaint. As to each count, the information alleged Hernandez committed a lewd act on multiple children (§ 1203.066, subd. (a)(7)), and committed a section 667.61, subdivision (c), offense against more than one victim (§ 667.61, subds. (b), (e)).

Hernandez filed a motion to dismiss for precharging delay. The prosecution opposed the motion. As we explain below in greater detail, the trial court, Judge Michael A. Leversen, denied the motion. The matter went to trial before Judge Cheri T. Pham.

Before trial, the prosecution filed numerous motions in limine. As relevant here, the prosecution sought to admit J.R.'s, E.S.'s, and Y.S.'s CAST interviews. Because this is an issue on appeal, we will discuss the facts in greater detail below. Suffice it to say, the court ruled the three CAST interviews were admissible. Additionally, the prosecution sought to exclude evidence Juan, Maria, and the girls practiced the Santeria religion. Again, because this is an issue on appeal, we will discuss it in greater detail below—the court ruled the evidence was inadmissible. Finally, in its

motions in limine, the prosecution stated it did not intend to admit Hernandez's statements.

A. Prosecution's Evidence

1. Juan

Juan testified concerning his relationship with his daughters, how he came to learn of Hernandez's conduct, and what transpired after the girls disclosed the abuse. During cross-examination, defense counsel attempted to question Juan about when he moved in with Maria. Additionally, counsel attempted to question him about whether Maria confronted him. We will discuss these facts in greater detail below because they are issues on appeal.

2. Maria

Maria testified about her family history, daughters, relationship with Hernandez and Rosa, and daughters' disclosure Hernandez molested them. On cross-examination, defense counsel asked Maria whether she asked S.R. if Juan touched her. She said, "Yes." The court sustained the prosecutor's objection to additional questions on this topic.

3. S.R. (counts 1 & 2)

At the time of trial, S.R., who was born in 1998, was 17 years old. S.R. testified she was five or six years old the first time Hernandez touched her. At her godmother's home, she received a necklace at a religious ceremony. She laid down on the couch next to Hernandez. He leaned over and kissed her on the lips. She tried to tell her mother, but her mother was busy. S.R. stated that over the years, whenever Hernandez hugged her, he would grab her breast. She tried to prevent this by crossing her arms over her chest. On another occasion, S.R. and her friend (Friend), were in Hernandez's garage. Hernandez walked into the garage with his dog and let it loose. S.R. hugged Hernandez because she was scared of the dog. Hernandez rubbed her vagina and breast and squeezed her buttocks over her clothing. S.R. told him to stop and pushed

him away. Hernandez tightened his grasp on her. Friend got up and left. A little later, S.R. and Friend discussed what happened. Friend told S.R. to tell her mother, but S.R. was too scared.[1] On another occasion, S.R. and her sisters stayed at Hernandez's house because Juan was in the hospital. She and Hernandez sat on the couch and watched television. During the commercials, Hernandez reached over and touched her vagina.

S.R. testified she told her sisters Hernandez was molesting her. After that, S.R. and her sisters told Hernandez's daughter (Daughter) what he had done to them. Daughter did not believe them. S.R. saw Hernandez touch J.R. on the buttocks one time.

S.R. testified Sauza was at her house to paint her bedroom. When Sauza asked her what color she wanted him to paint her bedroom, she said black because she was sad. S.R. first told Sauza and then her mother what Hernandez had done.

During cross-examination, defense counsel attempted to question S.R. about her biological father. Because it relates to an issue on appeal, we will discuss it in greater detail below.

CAST social worker Petrie interviewed 13-year-old S.R. about a week after she disclosed the sexual abuse; she interviewed the other girls the same day. The video of the interview was played for the jury. S.R. said the first time Hernandez touched her was at her godmother's house the day she got her necklace when she was five years old. He kissed her on the mouth. S.R. said the last time Hernandez touched her was in his garage a couple weeks earlier. S.R. and Friend were sitting on the couch when Hernandez walked in with his dog, which scared her. Hernandez hugged S.R. and touched her chest. Friend saw this and left. A couple days later, Maria asked S.R.

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[1] At trial, Friend confirmed S.R.'s testimony. Friend saw Hernandez "purposefully" and forcefully push S.R. against the back of the couch and rub her vagina and grab her breasts over her clothing. S.R. told Friend it had happened before. Friend previously told Detective Eric Leclercq that she witnessed Hernandez touch S.R.'s vagina and breasts.

whether Juan had touched her, S.R. told her no but Hernandez did. S.R. stated that when she was 11 years old, she and her sisters stayed at Hernandez's house because Juan was in the hospital. While they all sat on the couches watching sports, Hernandez touched S.R.'s vagina. S.R. thought her sisters saw this. S.R. described other occasions when Hernandez touched her breasts and buttocks.

S.R. stated that after her sisters saw Hernandez touch her buttocks, she asked them whether Hernandez touched them. When they changed the subject, S.R. told them she would tell their mother or hit them. Y.S. said he touched her buttocks. E.S. and J.R. said he touched their chest. S.R. said she saw Hernandez touch E.S.'s and J.R.'s chest. S.R. stated she and her sisters told Daughter what Hernandez had done to them, but she did not believe them.

4. J.R. (Counts 3 & 4)

At the time of trial, J.R., who was born in 2000, was nearly 16 years old. J.R. testified she was between nine or 11 years old when Hernandez touched her at his home. She stated that on a couple of occasions he put his hand on her breast and squeezed it while hugging her. J.R. said she was with Y.S. and saw Hernandez try to kiss S.R. on the mouth. J.R. and her sisters told Daughter what Hernandez did to them, but she did not believe them.

Petrie interviewed 11-year-old J.R., and the video of the interview was played for the jury. J.R. stated she was at Hernandez's house when she was 10 years old and when she hugged him, Hernandez squished her breasts over her clothing. J.R. told S.R. She said the last time it happened was when she gave Hernandez a hug in the garage and he squished her breasts over her clothing. Hernandez continued touching her until that summer when J.R. told him to stop. She remembered an incident in the kitchen when she was 11 years old where Hernandez grabbed her breasts, touched Y.S.'s vagina, and hit E.S.'s buttocks. J.R. told S.R. J.R. also said she saw Hernandez kissing S.R. on the mouth in the garage when she was 10 years old. Petrie asked J.R. about the day the

girls disclosed the abuse. J.R. said she and her sisters were going to tell Maria what Hernandez did to them, but they were scared. Before S.R. disclosed what happened, Maria told J.R. to go to her room. J.R. said an uncle was there "doing some cards" about S.R.'s life.

5. E.S. (Counts 5 & 6)

At the time of trial, E.S., who was born in 2001, was 14 years old. E.S. testified the first time Hernandez touched her was at his house when she was about seven years old. Everyone was in the living room watching a movie when Hernandez called her into his bedroom and had her lie down on his bed. He touched her breasts over her clothes and her vagina under her clothes. He touched her similarly a second time. He also touched her vagina with his foot. She estimated he touched her about 15 times over a year and a half. She saw Hernandez touch S.R. on more than one occasion and try to kiss her on the mouth. E.S. confirmed she and her sisters told Daughter, but she did not believe them.

Petrie interviewed 10-year-old E.S., and the video of the interview was played for the jury. E.S. stated Hernandez started touching her when Rosa started babysitting her. E.S. said they were watching a movie when Hernandez called her into his room. He pushed her onto the bed, closed the door behind him, squished her breasts over her clothing, and touched her vagina under her clothes. She stated the last time he touched her was a few months earlier under similar circumstances. E.S. said Hernandez touched her more than 15 times, her vagina about five times and her breasts under her clothes three times. E.S. said Hernandez touched her vagina with his foot. She saw him touch S.R.'s breasts.

6. Y.S. (Counts 7 & 8)

At the time of trial, Y.S., who was born in 2003, was 12 years old. When asked whether Hernandez ever touched her inappropriately, she said, "No." She did not

remember what she said to the police or during her CAST interview. Y.S. did not see Hernandez touch S.R. but only repeated what she heard from J.R.

Petrie interviewed eight-year-old Y.S., and the video of the interview was played for the jury. Y.S. stated the first time Hernandez touched her was in the garage. He made her stand up and touched her vagina under her shorts and above her underwear. The next day, he took her into his room and touched her buttocks beneath her underwear. On another occasion, after she used the restroom, he took her into his bedroom and spread apart her buttocks. On yet another occasion, Hernandez pulled down Y.S.'s pants and took a picture of her buttocks. He put the picture in his "pirate box" where he had a picture of S.R.'s breasts. Y.S. did not see Hernandez touch anyone else.

7. Detective Mucio Sanchez

Sanchez interviewed each of the girls when he responded to the call. Sanchez testified S.R. stated that when she and Hernandez were alone, he would touch her breasts, buttocks, and vagina. She said he touched her between 20 and 50 times. Sanchez stated J.R. was not forthcoming when he spoke with her. J.R. said Hernandez touched her once on the breast, and she had seen him touch S.R. on numerous occasions. Sanchez said E.S. stated Hernandez touched her multiple times on her vagina, breasts, and buttocks. E.S. also told him she saw Hernandez touch S.R. on her breasts and buttocks. Sanchez stated Y.S. said Hernandez touched her on the breasts and buttocks. She also said she saw Hernandez touch both S.R. and E.S. on their vaginas, breasts, and buttocks.

8. Child Abuse Accommodation Syndrome

Dr. Jody Ward, a psychologist, testified concerning child sexual abuse accommodation syndrome (CSAAS) and its five stages, which include "secrecy," "helplessness," "entrapment and accommodation," "delayed unconvincing disclosure," and "recantation." She explained CSAAS is a pattern of behaviors many children exhibit

after being molested while in an ongoing relationship. She stated two-thirds of children do not report abuse until they are an adult and many never report it at all.

B. Defense's Evidence

Two of Hernandez's children, his stepson and his daughter, testified they never saw Hernandez touch the children inappropriately. Daughter denied the girls ever told her Hernandez molested them. As to the incident in the garage, Daughter recalled Hernandez did not have the dog when she saw him go into the garage.

Roy Brown testified he had known Hernandez for 18 years and he was at the religious ceremony where S.R. received the necklace. He saw Hernandez hug S.R. and although he previously said he saw him kiss her on the cheek, that did not happen.

Dr. Bradley McAuliff, a psychologist, testified as an expert on child suggestibility and forensic interviewing. In preparation for his testimony, McAuliff reviewed the CAST interviews and preliminary police report. He testified memory fades over time and can incorporate information from other sources. He explained repeated questioning of children runs the risk of introducing information about the event that did not occur every time a question is asked, and infers the interviewer is not satisfied with the answer so the child will change their response. He said cross-contamination can occur when a witness obtains information about an event by discussing the event with another witness or interviewer and then adopts the information as their own. He added that the closer the relationship the greater potential for cross-contamination.

C. Jury's Verdicts & Sentencing

The jury found Hernandez guilty of counts 1 through 4 and found true the multiple victim allegation. The jury hung on counts 5 through 8, and on the prosecution's motion, the trial court dismissed those counts.

After the trial court denied Hernandez's new trial motion, the court sentenced him to prison for 45 years to life. It imposed consecutive terms of 15 years to life on counts 1, 2, and 3, and a concurrent term of 15 years to life on count 4.

DISCUSSION

I. Motion to Dismiss

Hernandez argues the trial court erred by denying his motion to dismiss for precharging delay. We disagree.

A. Facts

In his motion to dismiss, Hernandez argued the two years and six months delay between investigating the allegations, in December 2011, and filing the complaint, in May 2014, was prejudicial. Hernandez asserted prejudice could be presumed because of the length of the delay. Additionally, he claimed prejudice was demonstrated because his memory and the prosecution's witnesses' memories of the events were fading.

The motion to dismiss was supported by Hernandez's declaration, which we provide verbatim without correcting or noting errors in usage or grammar: "In March 2014, when I was charged in this matter, I was asked to recall events occurring in 2003, 2009, and 2010. I was asked what my memory was concerning the allegations against me. I know that I committed none of the acts that I have been accused of, but I do not recall the places, persons, and circumstances necessary to disprove the accusations. To make matters worse the accusations are vague as to time and place and are devoid disinterested who can supports the accuser's accusations. The accuser's memories as reported in the police are vague in the first place. Thus, my memory loss due resulting from the delay in charging is all the more prejudicial."

The prosecution opposed the motion to dismiss. Citing to various Penal Code provisions, the prosecutor contended it was prosecuting the offenses well within the allowable time limits.

At a hearing on the motion before Judge Leversen, the trial court stated it had reviewed the moving papers, and counsel argued the motion. In denying the motion, the court stated the following: "This was brought well within the statutory time permitted by the Legislature to bring these actions. [¶] Any defendant in a similar position can

argue and submit that his memory has faded. But . . . the Legislature . . . specifically permitted these types of cases to be brought within this time frame . . . ."

B. Law

The principles governing a claim of precharging delay are well settled. The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution protect a defendant from the prejudicial effects of lengthy, unjustified delay between the commission of a crime and the defendant's arrest and charging. (*People v. Jones* (2013) 57 Cal.4th 899, 921 (*Jones*).) "The statute of limitations is usually considered the primary guarantee against overly stale criminal charges [citation], but the right of due process provides additional protection, safeguarding a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence [citation]." (*Ibid*.)

"'A defendant seeking relief for undue delay in filing charges must first demonstrate resulting prejudice, such as by showing the loss of a material witness or other missing evidence, or fading memory caused by the lapse of time. [Citation.] Prejudice to a defendant from precharging delay is not presumed. [Citations.] In addition, although "under California law, negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process. . . . If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation." [Citation.] If the defendant establishes prejudice, the prosecution may offer justification for the delay; the court considering a motion to dismiss then balances the harm to the defendant against the justification for the delay. [Citation.] But if the defendant fails to meet his or her burden of showing prejudice, there is no need to determine whether the delay was justified. [Citations.]' [Citation.]

Although defendant frames his claim as one under both the federal and state Constitutions, '[b]ecause the law under the California Constitution is at least as favorable to defendant as federal law, we apply California law to defendant's claim.' [Citation.]" (*Jones, supra,* 57 Cal.4th at pp. 921-922.) "'We review for abuse of discretion a trial court's ruling on a motion to dismiss for prejudicial prearrest delay [citation], and defer to any underlying factual findings if substantial evidence supports them [citation].' [Citation.]" (*Id*. at p. 922.)

Here, the trial court did not abuse its discretion by denying Hernandez's motion to dismiss for precharging delay. Contrary to Hernandez's claim otherwise, the court did not err by *beginning* its analysis of the issue by considering the statute of limitations. The *Jones* court made it clear the statute of limitations is a factor a trial court may consider. (*Jones, supra,* 57 Cal.4th at p. 921.) Additionally, the trial court did consider the dispositive factor, prejudice. The court concluded Hernandez's claim his memory faded was too speculative to establish he was prejudiced. The *Jones* court also made it clear that if a defendant does not demonstrate prejudice, the inquiry ends and the court need not determine whether the delay was justified. (*Ibid*.) The court properly exercised its discretion by considering prejudice and determined Hernandez did not carry his burden—the court thus was not required to determine whether the delay was justified. The record is void of any evidence the court misunderstood the applicable test or its discretionary powers.

In his recitation of the applicable law, Hernandez cites to 12 cases. In arguing he demonstrated prejudice, Hernandez states, "The ruling of the court violates all of the above-cited cases regarding prejudice." That does not suffice. Hernandez must support a point with reasoned argument and citations to authority. (*People v. Redd* (2010) 48 Cal.4th 691, 744; *People v. Stanley* (1995) 10 Cal.4th 764, 793 [not this court's role to develop appellant's arguments].) In any event, his claim is meritless because Hernandez did not establish he was prejudiced.

Although we agree with Hernandez that he need only show "some" evidence of prejudice (*Garcia v. Superior Court* (1984) 163 Cal.App.3d 148, 151), the trial court did not abuse its discretion by concluding he failed to satisfy that minimal standard here. *Serna v. Superior Court* (1985) 40 Cal.3d 239 (*Serna*), is instructive.

In that case, defendant submitted a declaration he had no independent recollection of his activities leading to his arrest. (*Serna, supra,* 40 Cal.3d at p. 250.) The *Serna* court concluded defendant's "declaration was insufficient to support a finding of prejudice," and it explained the "[l]ack of recall may establish prejudice, but only on a showing that the memory loss persists after reasonable attempts to refresh recollection. 'The showing of actual prejudice which the law requires must be supported by particular facts and not . . . by bare conclusionary statements.' [Citation.]" (*Ibid.*)

Here, in his declaration, Hernandez simply stated his memory had faded but he did not support it with any detailed explanation. After denying he committed any of the charged acts, Hernandez stated in a cursory manner, he did "not recall the places, persons, and circumstances necessary to disprove the accusations." Like in *Serna*, Hernandez's declaration did not include any specificity concerning his claimed memory loss and it was nothing more than bare conclusionary statements. Other than asserting he was innocent and the charges were vague, he did not provide any particulars concerning his memory loss, i.e., any specific facts concerning events, dates, places, or people. And he did not assert any reasonable attempts to recall the events. (*People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1328 [where defendant asserts cannot remember overarching theme loss of evidence makes it difficult or impossible to prepare defense].) Hernandez did not sufficiently demonstrate his claimed memory loss made it difficult or impossible to prepare a defense.

Moreover, he did not identify any witness or potential witness whose memory faded or who was lost due to the lapse of time. Hernandez cites only to J.R.'s testimony at trial but here we are concerned with a pretrial motion, not a posttrial motion.

(*People v. Martinez* (2000) 22 Cal.4th 750, 769-770 [trial court may decide motion to dismiss on due process grounds after trial].) He also cites to the police report to establish J.R.'s memory loss, but Sanchez prepared that report a week after the girls disclosed the abuse and it does not establish prejudice because of precharging delay. In his motion to dismiss, Hernandez offered no evidence the precharging delay resulted in the loss of a witness or a witness's memory of the events.

Hernandez's reliance on *People v. Hill* (1984) 37 Cal.3d 491 (*Hill*), is misplaced. In that case, defendant's primary defense was mistaken identification. (*Id.* at p. 498.) The victims had initially identified defendant as the perpetrator, but by the time of the preliminary hearing could only make tentative in-court identifications. (*Ibid.*) Additionally, their memories were too uncertain to permit adequate cross-examination on the particulars of the person who attacked them. (*Ibid.*) In affirming the trial court's finding of prejudice, the *Hill* court stated defendant's showing demonstrated that with sharper memories the victims might have excluded defendant as the person who had assaulted them. (*Id.* at pp. 498-499.)

Unlike in *Hill*, here Hernandez made no showing. As we explain above, Hernandez did not establish with specificity his memory made it difficult or impossible for him to prepare a defense. Additionally, he did not establish any witnesses' fading memory made a fair trial impossible. The court did not abuse its discretion by denying his motion to dismiss for precharging delay.

II. Evidentiary Issues

Hernandez raises two evidentiary errors. We will address each in turn.

A. CAST Interviews

Hernandez contends the trial court erred by admitting J.R.'s, E.S.'s, and Y.S.'s CAST interviews because it failed to comply with Evidence Code section 1360. Not so.

1. Background

Before trial, the prosecution filed an in limine motion to admit J.R.'s, E.S.'s, and Y.S.'s CAST interviews pursuant to Evidence Code section 1360.[2] At the hearing on the motions in limine, Hernandez's defense counsel argued the statements in the CAST interviews were not reliable because they were inconsistent with the statements they made to the police one week earlier. After counsel asserted there was evidence of a motive to fabricate (a couple brief references to a "card reader"), the parties searched the transcripts to find the reference. The parties stipulated the court could review the CAST interviews and accompanying transcripts; they were marked as court exhibits. The court reserved ruling on the issue to give counsel an opportunity to review the CAST interviews. When the hearing resumed, the prosecution identified two references to a card reader, made by Y.S. Counsel argued they demonstrated a motive to fabricate, i.e., the card reader planted the idea they were molested.

The trial court stated it "reviewed the interviews of [J.R.], [Y.S.], and [E.S.]" and ruled they were admissible pursuant to Evidence Code section 1360. In a comprehensive ruling, the court stated the alleged victims were competent, easy to understand, and trustworthy. The court opined the statements were spontaneous and made without any undue influence from the interviewer. The court explained the statements during the interview were consistent. The court added that whether the CAST interview statements were inconsistent with statements to the police was a point defense counsel could argue to the jury. The court admitted the three CAST interviews.

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[2] The prosecution did not seek to admit S.R.'s CAST interview because Evidence Code section 1360 applies to minor's under the age of 12 and S.R. was 13 years old. However, during trial, Hernandez's defense counsel conceded the prosecution could play it for the jury.

2. Law & Analysis

Evidence Code section 1360 provides an exception to the hearsay rule in criminal proceedings for certain statements made by child abuse victims under the age of 12. Among other requirements not relevant here, the trial court must find "in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability." (Evid. Code, § 1360, subd. (a)(2).)

The following factors are a guide to determine reliability and trustworthiness: "(1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) use of terminology unexpected from a child of that age; and (4) lack of a motive to fabricate. [Citation.]" (*People v. Eccleston* (2001) 89 Cal.App.4th 436, 445 (*Eccleston*).) We review a trial court's admission of evidence pursuant to Evidence Code section 1360 for an abuse of discretion. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367.)

Here, the trial court did not abuse its discretion by admitting the three CAST interviews. Contrary to Hernandez's claim in his opening brief, which he withdraws in his reply brief, the trial court did review the three interviews. Additionally, the court provided a detailed ruling addressing all the *Eccleston* factors in addressing the time, content, and circumstances of the statements as required by Evidence Code section 1360. The court opined the girls' CAST interview statements were spontaneous and consistent, the girls were competent, the girls terminology was appropriate for their age, and there was no evidence of a motive to fabricate.

In his opening brief, in a heading on page 33, Hernandez asserts the trial court erred by determining reliability without comparing the girls' CAST interview statements with their statements to the police the prior week. But Hernandez does not develop this argument further. In his reply brief, he contends the Attorney General conceded the court did not compare the two and this was error.

Hernandez cites to no authority,[3] and we found none, that requires a trial court to compare the girls CAST interview statements to the girls' other statements in ruling on admissibility pursuant to Evidence Code section 1360. Evidence Code section 1360, in relevant part, requires the trial court to determine whether "the time, content, and circumstances of the statement provide sufficient indicia of reliability." We conclude the focus of the inquiry is on the time, content, and circumstances of the statement sought to be admitted and not the time, content, and circumstances of other statements. (See *Idaho v. Wright* (1990) 497 U.S. 805, 822 [admissibility under Confrontation Clause requires hearsay evidence to possess indicia of reliability by virtue of inherent trustworthiness and not by reference to other evidence at trial].) If the girls' CAST interview statements were inconsistent with their previous statements to the police, that goes to the weight of the evidence not its admissibility under Evidence Code section 1360, and defense counsel was free to highlight any inconsistencies to the jury. The court did not abuse its discretion by admitting J.R.'s, E.S.'s, and Y.S.'s CAST interviews. Because we conclude the court did not abuse its discretion, we need not address whether Hernandez was prejudiced.

B. Family History

Hernandez contends that in a series of evidentiary rulings, the trial court erred by excluding evidence that left the jury with "the false appearance of stability of the family which left only Hernandez as the sole destabilizing factor[]" and that bolstered the girls' credibility. He contends the trial court erred by excluding the following evidence: S.R.'s and J.R.'s father moved out of the house; Juan moved into the house; and the family practiced Santeria. We will address each contention below.

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[3] Hernandez notes he cited to *In re Cindy L.* (1997) 17 Cal.4th 15 (*Cindy L.*), below, but he does not explain its applicability on appeal. That case concerned the child dependency exception in sexual abuse cases and not Evidence Code section 1360. (*Cindy L., supra,* 17 Cal.4th at p. 18.) *Cindy L.* provided the *Eccleston* factors as stated in *Idaho v. Wright, supra,* 497 U.S. at pages 821-822.

1. Background

a. Santeria

Before trial, the prosecution sought to exclude evidence Juan, Maria, and the girls practiced Santeria. At the hearing on the motions in limine, after addressing the issue of the admissibility of the CAST interview, but before the court ruled on that issue, the trial court asked defense counsel whether he sought to admit evidence the family practiced Santeria. Counsel responded, "It only comes up to give context to a particular situation, that being the event that [S.R.], the original accuser, indicated was the first incident with [Hernandez]." Counsel explained evidence concerning the religious ceremony where S.R. received the necklace provided context for her claim regarding the first incident and contradicted what she said during her CAST interview. Counsel added, "So I'm not even -- I don't care -- it's what they call Santeria. It could be Orthodox Judaism. It doesn't matter to me." The court asked counsel whether there was a way to question Brown, who was a percipient witness to the first incident, without discussing Santeria. Counsel said they were watching soccer and Brown was not conducting a ceremony. The court stated all counsel had to do was ask Brown whether he was present on the day in question, what was he doing, and what did he see Hernandez and S.R. doing. Counsel replied, "Okay." The court stated it would admit that evidence without admitting evidence of Santeria. Counsel stated the jury might wonder why people were congratulating her. After the court insisted the evidence could be sanitized, counsel stated "it could be any religion[]" and it could have been a "first communion" or a "bar mitzvah." They continued to discuss whether the evidence could be sanitized without leaving the jury to wonder why people were congratulating S.R. After hearing from the prosecutor, the court stated, "If the People are agreeing to sanitize it to the extent of a religious ceremony, then that's by stipulation of the parties." The court ruled evidence the family practiced Santeria or Brown's or his wife's role in the religion was completely

irrelevant and unduly prejudicial. When the court asked defense counsel whether he understood the parameters of the ruling, counsel stated, "Yes, your honor."

b. Juan

During defense counsel's cross-examination of Juan, the following colloquy occurred:

"[Defense counsel]: Was [Maria] still married at the time when you started dating her?

"[Prosecutor]: Objection. Relevance.

"[Trial court]: Sustained.

"[Defense counsel]: Was Francisco . . . still around when you started dating [Maria]?

"[Prosecutor]: Objection. Relevance.

"[Trial court]: Sustained.

"[Defense counsel]: At some point Francisco and [Maria] split up so you could get together, correct?

"[Prosecutor]: Objection. Relevance.

"[Trial court]: Calls for speculation. Sustained.

"[Defense counsel]: At some point you started dating [Maria], correct?

"[Juan]: Yes.

"[Defense counsel]: Do you recall what year that was?

"[Prosecutor]: Objection. Asked and answered.

"[Trial court]: Sustained."

c. S.R.

During defense counsel's cross-examination of S.R.**,** the following colloquy occurred:

"[Defense counsel]: Your biological dad, when did he stop living with you?

"[Prosecutor]: Objection. Relevance.

"[Trial court]: Sustained.

"[Defense counsel]: Did your biological dad go to live with . . . Hernandez at some point?

"[Prosecutor]: Objection. Relevance.

"[Trial court]: Sustained.

"[Defense counsel]: How did you feel when your biological father left your home?

"[Prosecutor]: Objection. Relevance.

"[Trial court]: Sustained."

2. Law & Analysis

a. Santeria

Hernandez claims the trial court erred by excluding evidence the family practiced Santeria because it sanitized the prosecution's case, created the appearance the family was stable, and bolstered the girls' credibility. Hernandez forgets he did not seek to admit this evidence for these purposes.

A contention on appeal that a trial court erred by excluding evidence is generally waived or forfeited unless an offer of proof and/or objection to that error was made in the trial court. (Evid. Code, § 354; *People v. Morrison* (2004) 34 Cal.4th 698, 711 (*Morrison*) [offer of proof required].)

Here, Hernandez did not seek to admit evidence the family practiced Santeria. Hernandez did not file written in limine motions. At the hearing on those motions, the trial court addressed the admissibility of numerous pieces of evidence, including the CAST interviews and the family's Santeria practices. During the discussion of the admissibility of the CAST interviews, which occurred before the discussion of the evidence regarding Santeria, defense counsel asserted the girls had a motive to fabricate, referencing the girls' statements regarding the card reader. The court

reserved ruling on that issue, addressed four other items of evidence, and then addressed evidence of Santeria.

When the court addressed the issue, it asked defense counsel whether he sought to admit evidence the family practiced Santeria. Counsel said the evidence was to provide context for the first incident. Counsel added the following: "I don't care -- it's what they call Santeria. It could be Orthodox Judaism. It doesn't matter to me." Later, counsel stated, "It could be any religion[]" and it could have been a "first communion" or a "bar mitzvah." Counsel's statements establish he did not seek to admit evidence the family practiced Santeria, as he now claims, "to show an unstable family dynamic and a source for the imaginings, exaggerations, and fabrications of the children[.]" Counsel's statements demonstrate the evidence was to provide context, and the evidence could have concerned any religious celebration. Counsel did not object to the court's ruling sanitizing this evidence or make an offer of proof.

Hernandez relies on his offer of proof during the discussion of the admissibility of the CAST interviews and his reference to the girls' statements concerning the card reader. But that discussion was in the context of Evidence Code section 1360 and whether the girls had a motive to fabricate. Counsel's subsequent statements concerning his indifference to the type of religion, and his lack of objection or offer of proof, demonstrate he did not seek to admit evidence the family practiced Santeria to show the family was unstable. Because he has not shown any evidentiary error, his federal constitutional rights were not violated. (*People v. Riccardi* (2012) 54 Cal.4th 758, 809-810 (*Riccardi*) [routine application of evidentiary rules does not implicate due process rights], disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) There was no error, and thus he was not prejudiced.

b. Cross-Examination of Juan & S.R.

Hernandez complains the trial court erred during his cross-examination of Juan and S.R. by preventing him from eliciting evidence concerning when S.R.'s biological father moved out of the house and when Juan moved in. Again, we disagree.

Again, a contention on appeal that a trial court erred by excluding evidence is generally waived or forfeited unless an offer of proof and/or objection to that error was made in the trial court. (Evid. Code, § 354; *Morrison, supra*, 34 Cal.4th at p. 711 [offer of proof required].) However, "if the trial court excludes evidence on cross-examination, no offer of proof is necessary to preserve the issue for consideration on appeal. (Evid. Code, § 354, subd. (c).)" (*People v. Foss* (2007) 155 Cal.App.4th 113, 127 (*Foss*).)

We do note however, an offer of proof exists for the benefit of the appellate court. """"Before an appellate court can knowledgeably rule upon an evidentiary issue presented, it must have an adequate record before it to determine if an error was made.' [Citation.]" [Citation.] "The offer of proof exists for the benefit of the appellate court. The offer of proof serves to inform the appellate court of the nature of the evidence that the trial court refused to receive in evidence. . . . The function of an offer of proof is to lay an adequate record for appellate review. . . ." [Citation.]' [Citation.]" (*Foss, supra*, 155 Cal.App.4th at p. 127.)

Although generally an offer of proof is unnecessary when a trial court excludes evidence on cross-examination, an adequate record is required for an appellate court to determine whether there was error. When the court excluded this evidence during counsel's cross-examination of Juan and S.R., counsel did not make an offer of proof. On appeal, Hernandez does not explain with any specificity how this evidence was relevant (Evid. Code, §§ 350, 210) to any disputed fact. He simply states the evidence shows the family was unstable. Nor does he explain how its relevance is not outweighed by any undue prejudice (Evid. Code, § 352). On the record before us,

Hernandez has not demonstrated error, and again his federal constitutional rights were not implicated. (*Riccardi, supra,* 54 Cal.4th at pp. 809-810.)

III. Cross-Examination

A. Juan

Hernandez asserts the trial court erred by limiting his cross-examination of Juan and S.R. and thus violated his federal constitutional rights. Not so.

1. Background

During cross-examination, defense counsel asked Juan whether before December 2011, there was any suspicion S.R. had been molested. The trial court sustained the prosecutor's objections on relevance, vagueness, and speculation grounds. Counsel asked Juan whether prior to December 2011, Maria confronted him. The court suggested a sidebar in chambers.

In chambers with the reporter present, the court stated it seemed counsel was about to inquire of Juan whether one of the girls accused him of inappropriate touching and whether counsel had an offer of proof. Counsel stated the police report indicated Maria confronted Juan about touching S.R. The prosecutor disagreed, stating an officer recounted a conversation where Maria asked S.R. about Juan. The court stated that was different from Maria confronting Juan. After counsel stated he read it somewhere, the court said this was an important detail counsel would have "marked" and if it was not in the record, counsel's question was "reckless at a minimum." The prosecutor objected because third party culpability evidence must be disclosed before trial.

The trial court ruled that if counsel could not find it, the court would prohibit counsel from questioning Juan on this point "because you don't even have an offer of proof." The court stated counsel was "just slinging mud without any basis." The court sustained the prosecutor's relevance and Evidence Code section 352 objections.

The court stated it did not want any more surprises and asked counsel whether he was going to present a third party culpability defense. Counsel insisted evidence Maria confronted Juan was "in here somewhere[]" and he would ask "him" whether Maria confronted Juan. The court stated it would only allow counsel to inquire on this point if it was in the police report or transcript and the prosecution had notice. Counsel repeated it was "somewhere." The court stated that if counsel planned to introduce something, he must be able to substantiate it with a police report or transcript. Counsel cited to S.R.'s statement to Petrie that Maria asked her whether Juan had touched her. The court explained Maria asking S.R. was different from Maria confronting Juan. After counsel repeated he thought the statement was in the police report, the court said, "Well, until you find it, the objection is sustained." Counsel resumed cross-examining Juan. Later, counsel admitted it was Maria confronting S.R. and not Maria confronting Juan.

2. Law & Analysis

Again, an offer of proof is *unnecessary* to preserve an issue for appellate review when a trial court excludes evidence on cross-examination. However, if the evidence defendant sought to elicit was not within the scope of direct examination, an offer of proof is required to preserve the issue for appellate review. (*Foss, supra,* 155 Cal.App.4th at p. 127.) Defense counsel's question to Juan was outside the scope of direct examination, and Hernandez does not contend otherwise. Thus, counsel was required to make an offer of proof. Counsel repeatedly stated Maria asked S.R. whether Juan touched her, but counsel did not make an offer of proof concerning Maria confronting Juan, and counsel did not object. Counsel later conceded evidence Maria confronted Juan did not exist, and counsel did not renew his request. (*People v. Holloway* (2004) 33 Cal.4th 96, 133 [defendant cannot challenge tentative pretrial evidentiary ruling on appeal "if [he] could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself"].)

On appeal, Hernandez claims evidence S.R. knew her mother believed her would have bolstered her confidence and caused her to imagine or fabricate the allegations. Counsel did not assert this as an offer of proof below. Because this line of questioning was beyond the scope of direct examination and counsel did not make an offer of proof, this claim was not preserved for appellate review. (*Foss, supra,* 155 Cal.App.4th at p. 128 [offer of proof must specify actual evidence to be produced and not just facts or issues].)

Assuming for the sake of argument Hernandez's offer of proof was sufficient, the trial court did not abuse its discretion by excluding it. Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact," and only relevant evidence is admissible. (Evid. Code, §§ 210, 350.) "Evidence is irrelevant, however, if it leads only to speculative inferences." (*Morrison, supra,* 34 Cal.4th at p. 711.) Defense counsel admitted the record included no evidence Maria confronted Juan about touching S.R. Counsel's questions lacked foundation and were pure speculation, and thus were irrelevant. The record includes no evidence the girls ever accused Juan of any inappropriate touching. If evidence is irrelevant, an Evidence Code section 352 analysis is unnecessary. (*People v. Alexander* (2010) 49 Cal.4th 846, 904 [trial court no discretion to admit irrelevant evidence].) Therefore, the court did not abuse its discretion.

Hernandez claims the trial court misapplied section 1054.3, which governs the defendant's discovery obligations in a criminal prosecution, to limit his cross-examination of Juan. The court did not rely on that section. The court explained that if counsel intended to rely on a third party culpability defense the court needed to address such evidence ahead of time, and if he intended to cross-examine Juan on this point, he needed to substantiate it with something in the police report or transcript. The court did not exclude this line of inquiry because Hernandez violated section 1054.3.

With respect to his claim the trial court's ruling implicated his federal constitutional rights, including his right to confront witnesses, right to a fair trial, and right to present a defense, he did not preserve this issue for appellate review. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1122 (*Kipp*) [federal and state constitutional claims not preserved for appellate review when counsel did not object on these grounds].) In any event, he is mistaken.

"'[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. [Citation.]' [Citation.] The [C]onfrontation [C]lause allows 'trial judges . . . wide latitude . . . to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.' [Citation.] In other words, a trial court may restrict cross-examination on the basis of the well-established principles of Evidence Code section 352, i.e., probative value versus undue prejudice. [Citation.]" (*People v. Kin*g (2010) 183 Cal.App.4th 1281, 1314-1315, fn. omitted.) As we explain above, the trial court did not violate Hernandez's Sixth Amendment confrontation rights because the line of inquiry lacked foundation, was speculative, and was therefore irrelevant.

To the extent Hernandez asserts the court's ruling prevented him from presenting a defense, we disagree. Generally, the application of the ordinary rules of evidence do not impermissibly infringe a defendant's right to present a defense. (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) Defense counsel thoroughly cross-examined the prosecution's witnesses about the disclosure and presented expert testimony concerning suggestibility. On this record, Hernandez has not established the trial court's ruling violated his right to a fair trial. Because Hernandez has not demonstrated error, we need not address whether he was prejudiced.

B. S.R.

1. Background

Before trial, at the hearing on the in limine motions, the trial court confirmed the prosecution did not intend to introduce Hernandez's statements during its case-in-chief. The prosecutor agreed. When the court asked defense counsel whether any attempt by the defense to introduce Hernandez's statements without him testifying would be inadmissible self-serving hearsay, counsel replied, "I would agree."

During cross-examination, defense counsel questioned S.R. about the first incident in the garage and the dog. Counsel asked S.R. whether she knew Hernandez had back problems. The trial court sustained the prosecutor's foundation objection. Counsel asked whether she hugged him or jumped on him, and S.R. replied she hugged him. When counsel asked whether it was true she tried to jump on him, the court overruled the prosecutor's objections. S.R. stated she did not remember trying to jump on him. Counsel asked whether she hugged him or "bugg[ed]" him for money to buy ice cream, and the court overruled the prosecutor's objection. S.R. said she did not remember. Counsel asked whether she remembered Hernandez telling her not to jump on him because he had a bad back. The prosecutor requested a sidebar, and the court excused the jury for lunch.

Out of the presence of the jury, the prosecutor asserted defense counsel obtained much information from the family that he had not disclosed to the prosecution. Counsel said the statement was in Hernandez's interview with the police. The prosecutor disagreed and said that was Hernandez's statement and requested it be excluded. The court asked whether Hernandez would testify, and counsel said he was undecided. The court sustained the prosecutor's lack of foundation objection, unless Hernandez testified. The court asked counsel whether he had any additional impeachment evidence and reminded counsel of his obligation to disclose that information to the prosecution. The court recessed for lunch.

After lunch, the prosecution stated she searched the transcripts and found no reference to Hernandez having a bad back. Counsel insisted it was in the police report. When the court asked counsel to identify where the statement was located, counsel proceeded to review the transcript. Frustrated, the court said it just needed S.R.'s portion and did not need counsel to read the entire transcript. As counsel reviewed the transcript, the court asked whether Hernandez told S.R. not to jump on him because he had a bad back. Counsel replied Hernandez told the police that he told S.R. not to jump on him because he could not be lifting things. The court stated counsel's question to S.R. was not accurate and he could inquire about Hernandez telling S.R. not to jump on him but not whether he had a bad back. The prosecutor objected the statement was hearsay. Counsel responded Hernandez's statement contradicted S.R.'s version of what happened. The court stated Hernandez would have to testify and ruled it was inadmissible hearsay.

2. Law & Analysis

Constitutional claims are not preserved for appellate review unless a defendant objects on these grounds. (*Kipp, supra*, 26 Cal.4th at p. 1122.) Here, Hernandez did not argue the trial court's exclusion of this evidence violated his Sixth Amendment confrontation rights, his due process rights, or his right to a fair trial. Hernandez forfeited appellate review of this issue by not objecting below.

He also forfeited appellate review of the hearsay issue. Before trial, at the in limine hearing, defense counsel agreed with the trial court that attempting to introduce Hernandez's statements without him testifying would be inadmissible self-serving hearsay. Later, when discussing whether counsel could cross-examine S.R. concerning whether Hernandez told her not to jump on him because he had a bad back, counsel never asserted Evidence Code section 1241 as a basis for admission of the evidence. To preserve a hearsay exception for appellate review, defense counsel had to assert this ground below. He failed to do so and this contention is forfeited. (*People v. Edwards* (2013) 57 Cal.4th 658, 727; *Board of Education v. Haas* (1978) 82 Cal.App.3d 278, 282

[determinations as to the propriety of the use of hearsay are best left to the trial court].) Finally, again, the trial court did not rely on section 1054.3 to conclude Hernandez violated the discovery rules. The court ruled the statement was inadmissible hearsay.

IV. Cumulative Error

Hernandez claims there was cumulative prejudicial error. We have concluded there were no errors, and thus, Hernandez's claim is meritless.

V. Prejudice

We have concluded there were no errors, and thus Hernandez was not prejudiced. Out of an abundance of caution, however, we will briefly address prejudice because Hernandez's briefs are at times confusing, undeveloped, and scattershot, he raises many issues of state and federal law, and he forfeited appellate review of some of the issues by not raising them below.

Even under the standard of review reserved for constitutional errors, we conclude Hernandez was not prejudiced. Under the *Chapman* test, error is harmless when it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Here, S.R. remembered and consistently described the details of Hernandez's sexual molestations from the time Sanchez interviewed her in December 2011 to the time she testified in June 2016. Friend corroborated S.R.'s account of what happened in the garage. S.R.'s sisters corroborated much of what she reported. J.R. told Sanchez that Hernandez squeezed her breast once, and at trial she described how he squeezed her breasts when he hugged her, and said it happened on multiple occasions. Additionally, S.R. and J.R. corroborated each other. Finally, the jury's verdict reflects it separately considered each count based on the evidence, and declined to blindly accept any suggestion the children were credible and had no reason to lie. Based on the entire record, we are convinced beyond a reasonable doubt any errors did not contribute to the jury's verdicts.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

THOMPSON, J.

GOETHALS, J.